84-1094

No.————————

Office-Supreme Court, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS,
CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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CARLOS FORNASH,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

————————

PETITION FOR WRIT OF CERTIORARI TO THE CAMPBELL COUNTY CIRCUIT COURT, 17TH JUDICIAL DISTRICT OF THE COMMONWEALTH OF KENTUCKY

————————

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QUESTION PRESENTED FOR REVIEW

IS IT A VIOLATION OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO PERMIT A TRIAL JUDGE TO SENTENCE A DEFENDANT FOUND GUILTY BY THE TRIAL JUDGE TO A MAXIMUM SENTENCE OF ONE YEAR IN JAIL AND A $500 FINE WITHOUT FIRST CONSIDERING THE DEFENDANT FOR PROBATION OR CONDITIONAL DISCHARGE AND WITHOUT FIRST CONSIDERING THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, ALL OF WHICH IS MANDATED BY KENTUCKY STATE LAW PURSUANT TO KRS 533.010?

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APPENDIX:

Exhibit A 1a
Judgment and Sentence of the Campbell County District Court in Case No. 83-M-2272 filed on February 13, 1984.

Exhibit B 2a
Judgment of Campbell County Circuit Court in Case No. 84-X-10, filed on May 15, 1984.

Exhibit C 5a
Order Denying Discretionary Review in the Kentucky Court of Appeals, Case No. 84-CA-1273-D, entered July 24, 1984.

Exhibit D 6a
Order Denying Discretionary Review in the Supreme Court of Kentucky, Case No. 84-SC-650-D, entered November 8, 1984.

Exhibit E 7a
Section 533.011, Kentucky Penal Code.

TABLE OF CASES AND AUTHORITIES

Cases Cited: Page

Bell v. *Commonwealth,* Ky.App., 566 S.W.2d 785 (1978) 3, 4, 5

Brewer v. *Commonwealth, Ky.,* 550 S.W.2d 474 (1977) 4

Authorities Cited:

Amendment Fourteen, Constitution of the United States 2

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PETITION FOR WRIT OF CERTIORARI TO THE CAMPBELL COUNTY CIRCUIT COURT, 17TH JUDICIAL DISTRICT OF THE COMMONWEALTH OF KENTUCKY

The petitioner, Carlos Fornash, by and through counsel, prays that a Writ of Certiorari issue to review the judgment and order of the Campbell Circuit Court entered in this case on May 15, 1984.

OPINIONS BELOW

No written opinion regarding the issue in this case was filed or published by the Campbell District Court and no written transcript has been prepared from the oral recording of the proceedings. The written Judgment of the Campbell Circuit Court is at Pages 2a-4a of the Appendix and has not been officially reported.

JURISDICTIONAL STATEMENT

The Judgment of the Campbell Circuit Court, 17th Judicial District of the Commonwealth of Kentucky was entered on May 15, 1984 (App. B, page 2a). The Court of Appeals of Kentucky denied discretionary review on July 24, 1984 (App. C, page 5a). The Supreme Court of Kentucky denied discretionary review on November 8, 1984 (App. D, page 6a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS

AMENDMENT 14, CONSTITUTION OF THE UNITED STATES:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The petitioner was charged with the offense of assault in the fourth degree in violation of KRS 508.030, a misdemeanor. The victim of the alleged assault was one Myron Rutherford who filed a criminal complaint against the petitioner. The petitioner was served with a criminal complaint on December 7, 1983.

After a trial before the court without the intervention of a jury, the trial judge found the petitioner guilty and sentenced him to the maximum sentence permitted under the law to one year in jail and a fine of $500. The trial judge sentenced the petitioner to this maximum sentence

without first considering the petitioner for probation or conditional discharge and without considering the history, character and condition of the petitioner. The trial judge stated that he would not consider the petitioner for probation, conditional discharge or work release. Judgment was entered on February 13, 1984 (App. A, page 1a).

The conviction was appealed to the Campbell Circuit Court on the grounds, *inter alia*, that the trial judge erred in not considering petitioner for probation or conditional discharge and by not considering the history, character and condition of the petitioner as mandated by KRS 533.010 (App. E, page 7a). On May 15, 1984, the Campbell Circuit Court affirmed the decision of the trial court (App. B, page 2a).

On July 24, 1984, the Kentucky Court of Appeals denied discretionary review (App. C. page 5a). On November 8, 1984, the Kentucky Supreme Court denied discretionary review (App. D, page 6a).

REASONS TO ALLOW WRIT OF CERTIORARI

The Court should grant certiorari because the Campbell Circuit Court failed to consider the implicit mandate of KRS 533.010 concerning probation and conditional discharge prior to sentencing a defendant. The Campbell Circuit Court also failed to consider the history, character and condition of the petitioner prior to imposing sentence and prior to considering probation and conditional discharge.

In *Bell* v. *Com.*, Ky.App., 563 S.W.2d 785 (1978) the Court of Appeals of Kentucky discussed at length the requirements of KRS 533.010. The Court of Appeals discussed the sentencing procedures outline in KRS 533,-

010 and the requirements set forth in *Brewer* v. *Commonwealth,* Ky., 550 S.W.2d 474 (1977). In pertinent part, the Court in *Bell, supra,* held at page 787:

> *Brewer, supra,* did refer to KRS 533.010, which relates to sentencing in all crimes except where the death penalty has been imposed, and the opinion on this point reads:
>
> > The record of the proceedings leading up to the entry of the judgment should clearly reflect the fact that the consideration required by KRS 533.010 has been afforded the convicted person before judgment was fully entered.
>
> KRS 533.010 does require the trial judge to consider probation or conditional discharge in all convictions except where the death penalty has been imposed, and subsection (2) reads:
>
> > Before imposition of a sentence of imprisonment, the court shall consider the possibility of probation or conditional discharge. After due consideration of the nature and circumstances of the crime, and the history, character and the condition of the defendant, probation or conditional discharge should be granted unless the court is of the opinion that imprisonment is necessary for protection of the public . . . .
>
> We do not conclude that the trial court has an obligation to provide pre-sentencing reports in misdemeanor cases as it is required to provide in felony cases, but we do conclude that the trial judge must comply with KRS 533.010 and give due consideration to the possibility of probation after first considering the crime and the defendant. To insure such compliance, the trial court must place in the record a statement sufficient to show that the necessary consideration has been given.

Finally, the Court in *Bell, supra,* gave a clear and concise caution to all trial judges in the Commonwealth of Kentucky wherein it stated at 788:

> We would caution all district and circuit judges, however, to clearly reflect compliance with KRS 533.010 in every judgment sentencing a defendant to jail.

It is clear from the record that the trial judge sentenced the petitioner to a maximum sentence of one year in jail and a fine of $500 prior to considering the petitioner for probation or conditional discharge and without considering the history, character and the condition of the petitioner. Accordingly, the judgment of the trial judge did not conform strictly to the statutory provisions of probation and conditional discharge and the sentence was improper. The sentencing of the petitioner by the trial judge clearly violates the petitioner's due process of law rights under the Fourteenth Amendment of the United States Constitution.

CONCLUSION

The decision of the Campbell Circuit Court concerning the sentencing of the petitioner should be reversed for the reasons set forth in the argument contained herein.

Respectfully submitted,

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APPENDIX

Exhibit A

CALENDAR

Date February 13,, 1984

TIME 11:15 A.M.

DISTRICT DIV II – HEHL

Case No.: 83-M-2272
Style: CARLOS FORNASH
Charges or Claim: 508.030 Assault
Proceedings: To 1 year – $500 fine
No probation

Judge Signature: /s/ LAMBERT HEHL

Date: 2/13/84

Exhibit B

CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

NO. 84-X-10

COMMONWEALTH OF KENTUCKY,

Plaintiff/Appellee,

vs.

CARLOS FORNASH,

Defendant/Appellant.

JUDGMENT

(Filed May 15, 1984)

This is an appeal from the Campbell District Court, Second Division, in which the appellant, Carlos Fornash, after a trial before the bench was found guilty of the offense of assault in the fourth degree under K.R.S. 508.-030 and sentenced to one year confinement in the Campbell County Jail and a fine of $500 and costs.

The appellant asserts three grounds for his appeal:

1. The appellant claims that he was entitled to a directed verdict at the conclusion of all the evidence. Admittedly, in this case, as in almost all trials, there was some conflict in the evidence. However, as has often been stated, the trial court (or the jury) in an appropriate case, has the opportunity to observe and judge the credibility of the witnesses. There was ample evidence presented on

behalf of the Commonwealth to support the finding of guilty by the Court. Under such circumstances, the appellate court should not overturn the verdict of the trial court which was in the better position to evaluate the testimony of the conflicting witnesses.

2. The appellant next urges that the trial court erred in not considering the appellant's prior record, if any, and by not considering appellant for probation or conditional discharge as mandated by K.R.S. 533.010. At the time the sentence was imposed, as well as at the subsequent hearing held on March 1, 1984, the trial court made it clear that confinement was being mandated, rather than probation, by reason of the very serious nature of the assault. While it might be desirable for the trial court, in imposing a sentence, to state specifically that probation had been considered and rejected, the clear implication here is that probation was being rejected because of the seriousness of the defendant's crime. As such, the requirement of consideration has been met.

3. Next, the appellant urges error in not granting his motion for a judgment notwithstanding the verdict. This has been covered in the portion of this opinion dealing with the appellant's motion for directed verdict.

4. Finally, the appellant urges error in not granting his motion for new trial. His complaint is that the rule regarding separation of witnesses was violated in that one Jack Howell, who did not testify, left the courtroom on several occasions and engaged in conversation outside the courtroom with other persons who also did not testify. As stated in *Jacobs vs. Commonwealth,* 551 SW 2d 223 (1977), "The purpose of this rule is, obviously, to prevent a prospective witness from adjusting his testimony to conform to that which he hears during the interrogation of

other witnesses. We have uniformly construed it as giving to the trial judge broad discretion in the matter of permitting or refusing to permit the testimony of a witness who has violated the rule of separation, and have refused to intervene in such cases except in cases where that discretion is found to have been abused."

There is no proof whatsoever that any of the witnesses presented by the Commonwealth did or could have heard any conversation by Howell. Even if they had, discretion would still lie with the court. Here, however, there is no proof whatsoever that any of the Commonwealth's witnesses were contaminated.

It appearing that no reversible error has been committed, it is the opinion of the Court that the Judgment of the lower court be and the same hereby is sustained.

/s/ G. A. MUEHLENKAMP
Judge

Exhibit C

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 84-CA-1273-D

CARLOS FORNASH,

Movant,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON MOTION FOR DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT ACTION NO. 84-X-10

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: McDONALD, CLAYTON, AND MILLER, JUDGES.

The Court, having considered the motion for discretionary review and the response thereto, and being otherwise sufficiently advised, ORDERS that it be, and is hereby, DENIED.

ENTERED: July 24, 1984

/s/ MICHAEL O. McDONALD
Judge, Court of Appeals

Exhibit D

SUPREME COURT OF KENTUCKY

84-SC-650-D
(84-CA-1273-D)

CARLOS FORNASH,

Movant,

v.

COMMONWEALTH OF KENTUCKY

Respondent.

CAMPBELL CIRCUIT COURT
84-X-10

ORDER DENYING DISCRETIONARY REVIEW

The motion of movant for a review of the decision of the Court of Appeals is denied.

ENTERED November 8, 1984.

/s/ ROBERT F. STEPHENS
Chief Justice

Exhibit E

KENTUCKY PENAL CODE

Chapter 533
Probation and Conditional Discharge

* * *

533.010 Criteria for utilizing chapter

(1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation or conditional discharge as provided in this chapter.

(2) Before imposition of a sentence of imprisonment the court shall consider the possibility of probation or conditional discharge. After due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant, probation or conditional discharge should be granted unless the court is of the opinion that imprisonment is necessary for protection of the public because:

(a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

* * *